IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1257 of 1978

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

UNION BANK OF INDIA

Versus

SURESH BHAILAL MEHTA

Appearance:

MR ARUN H MEHTA for Appellant

MR KC SHAH for Respondent

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 23/04/96

ORAL JUDGEMENT

1. This is an appeal under section 96 CPC filed by the original plaintiff, challenging the judgement and decree of the dismissal of its suit viz. Civil Suit No.2173/76, passed by the City Civil Court, Ahmedabad. The plaintiff had filed the suit against the defendants for a sum of Rs.13586.75 together with costs and interest.

2. The plaintiff averred that the first defendant first respondent was a person who had suffered financial

hardship on account of communal riots which broke out in the city of Ahmedabad in September 6, 1969, and therefore requested the plaintiff bank to extend to him credit facilities by way of a clean loan to continue his business activities. Accordingly the plaintiff bank sanctioned a loan of Rs.15,000/- and paid that sum to him on 5th December 1969. The first defendant at that time executed a demand promissory note for the said amount, an agreement of hypothecation and other documents in favour of the plaintiff bank, and the second defendant stood as a surety and/or guarantor for the liability of the first defendant. The second defendant, therefore, executed on the same day i.e. 5th December 1969 a letter of guarantee in favour of the plaintiff bank. Thus, according to the plaintiff, both the defendants are jointly and severally liable to pay to the plaintiff bank the outstanding balance on account of the loan together with interest. It is further averred that the first defendant confirmed the correctness of the debit balances in his account from time to time on 31st December 1969, 30th June 1970, 30th January 1971, 30th June 1974 and lastly on 29th March 1976, by signing the balance confirmation statements and handing over the same to the plaintiff bank. It is, therefore, averred by the plaintiff bank that by signing and handing over to the plaintiff such balance confirmation statements, the first defendant has renewed his liability and/or obligations to pay the debt, and under the Letter of Guarantee the second defendant is a continuing guarantor and thus he is jointly liable to pay the amount outstanding in the account of the first defendant. According to the plaintiff, after giving due credit for the amounts paid by the first defendant towards the suit loan and interest, a sum of Rs.13,586.75 is due and payable to the plaintiff by the defendants. The plaintiff bank had issued a notice dated 22nd May 1976 to both the defendants, but since the said notice was not complied with, the plaintiff was obliged to file the suit.

3. The plaintiff had set out in para 7 of the plaint the necessary formal recitals as to the cause of action, notice, non-compliance with the demand, etc., and therefore filed the suit as a Summary Suit under Order 37 of CPC.

4. In response to the summons for judgement the first defendant filed an application for leave to defend at Exh.11, and by a subsequent pursis at Exh.22, the same was adopted as his written statement in the suit. The first defendant contended that the suit is time-barred, he denied having obtained the suit loan in the sum of

Rs.15,000/- etc. According to him, the amount taken by him was not by way of a loan, but it was compensation for damage, or the amount was given to him as a subsidy and therefore there was no question of paying any interest thereon. He has denied his liability to repay the amount to the plaintiff, has denied having executed the promissory note in the sum of Rs.15,000/-, has denied having executed any agreement for hypothecation and has denied that the second defendant has stood as his surety and/or guarantor. He also denied that he had confirmed the debit balances in his account from time to time and had acknowledged the debt on the relevant dates by signing the letters of confirmation in respect of the statement of accounts and had thereby confirmed the debit balances.

5. The second defendant also contested the suit by his written statement at Exh.21 wherein he has contended inter alia that he has not executed a deed of guarantee or a letter of guarantee, had denied that he stood as a surety for the first defendant, has denied that the first defendant had from time to time confirmed the debit balance statements of his account, , and even if such statements were signed, that did not amount to an "acknowledgment" within the meaning of the law and therefore the suit was time-barred. He further contended that even if the first defendant had signed such an acknowledgment, such acknowledgment on the part of the first defendant would not extend the period of limitation as against him (i.e. the second defendant) and therefore the suit at least against him is time-barred. Further contentions taken by the second defendant in the written statement are not relevant for the purpose of the present appeal.

6. The trial court framed issues at Exh.24 on the basis of the pleadings of the parties, and after recording evidence as tendered by the respective parties, and considering the relevant submissions made by both the sides, recorded findings of fact on almost all the material issues in favour of the plaintiff bank. In this context the trial court found that the suit plaint has been legally and properly signed by the competent person, that the plaintiff had proved that it had made an advance of Rs.15,000/- to the first defendant, that the plaintiff had proved that the first defendant had executed a demand promissory note for Rs.15,000/- on 5th December 1969 in its favour, that the plaintiff had proved that the first defendant had executed a hypothecation agreement and other documents in its favour, that the plaintiff had proved that the second defendant had stood as a surety

for the first defendant, that the first defendant failed to prove that the amount received by him was by way of compensation for damage suffered by him during riots and that such amount was not to be repaid by him to the plaintiff etc. The trial court, however, held that the second defendant had proved that the plaintiff has by its inaction or negligence allowed the security to be reduced and impaired and therefore the second defendant stood discharged from its liability to the plaintiff.

6.1 The trial court also found on facts and evidence that the plaintiff had proved that the first defendant had confirmed the debit balance standing in his account from time to time, as alleged in para 5 of the plaint, and such confirmations would not discharge the second defendant from his liability or obligation to the plaintiff.

6.2 However, the material issue on which the trial court found against the plaintiff was to the effect that the suit is time-barred and beyond limitation. This is issue no.8.

7. So far as the issues of fact found in favour of the plaintiff are concerned, the same do not require a detailed discussion for the purpose of the present appeal filed by the plaintiff bank, except the issue of limitation which has been found against the plaintiff. I, therefore, do not propose to discuss the same in greater detail.

8. The main contention raised by learned counsel for the appellant is that the trial court was entirely wrong and was not justified in finding that the suit was time-barred, and was also not justified in recording a finding that the various documents established as evidence on the record of the case, would not necessarily amount to an "acknowledgment" within the meaning of section 17 and 18 of the Limitation Act, so as to extend the period of limitation and bring the date of filing of the suit within the period of limitation.

8.1 This contention raised by learned counsel for the appellant requires serious consideration in the context of the facts found and proved on the record of the case. It would be pertinent to discuss the same in the light of the evidence established on record, and also in the light of the findings and observations recorded by the trial court.

8.2 Firstly, as already found by the trial court in

favour of the plaintiff bank, the advance made to the first defendant was not a term loan, but was a clean loan. The trial court has also found that the cause of action had arisen in favour of the plaintiff on 5th December 1969 when the loan was granted, on the same day when the first defendant had executed a promissory note as also a deed of hypothecation in favour of the plaintiff bank, and on the same day when the second defendant had executed a deed of guarantee.

8.3 In the context of the aforesaid facts which establish the cause of action, the period of limitation for the purpose of bringing a suit for recovery of clean loan would be three years from the date of advance of the loan. Since the loan was advanced on 5th December 1969, such period of limitation would normally expire 5th December 1972. In fact the suit has been filed on 30th July 1976. Thus, it would prima facie appear that the suit has been filed beyond the prescribed period of limitation. However, the plaintiff has made certain recitals in the plaint, with a view to show that there were grounds upon which the plaintiff relies, on the basis of which the plaintiff would be entitled to claim exemption from the law of Limitation. Obviously these recitals have been made looking to section 18 of the Limitation Act. In paragraph 5 of the plaint the plaintiff has specifically asserted that the first defendant had confirmed the correctness of the debit balance which stood in his account from time to time viz. (1) 31st December 1969, (2) 30th June 1970, (3) 30th January 1971, (4) 30th June 1974 and (5) 29th March 1976. According to the plaintiff, in consonance with these recitals made in para 5 of the plaint, it was averred that such confirmation of debit balances in the account of the first defendant by the first defendant, the latter had renewed his liability and/or obligation to repay such amount inasmuch as the same amount to an "acknowledgment", and as regards the second defendant, since the latter was a continuing guarantor under the contract of guarantee, he should also be taken to have renewed his liability and obligation. It was, therefore, averred and pleaded that both the defendants were jointly and severally liable to pay up the suit claim.

8.4 The trial court after having noted and recorded these pleadings contained in the plaint, has referred to and relied upon the provisions of Order 7 Rule 6 CPC in order to non-suit the plaintiff.

9. The trial court was quite clear in its own mind, which is apparent from the observations made in para 14

of the impugned judgement, that what the plaintiff intended to state or intended to plead was that the first defendant had acknowledged his liability from time to time and had thus given rise to a fresh period of limitation against him, commencing on each occasion on the date of which he confirmed in succession the various confirmation statements of the debit balances.

10. The trial court has relied upon section 18 of the Limitation Act and has found that the same would confer an extension of time on account of an acknowledgment of liability, but has also read into the same a qualifying clause viz. that such acknowledgment must have been made before the expiration of the prescribed period of limitation for a suit. In other words, on a true and correct interpretation of the section, not only the first acknowledgment should be within the prescribed period of limitation for filing of the suit, but each of the subsequent acknowledgments must also be within the prescribed period for filing such a suit, when computed from the date of the earlier acknowledgment. In other words, even if the first acknowledgment is within the period of limitation and the subsequent acknowledgments are each within the successive periods of limitation, the same would bring the suit within the period of limitation only if each and every one of such acknowledgments was within the prescribed period of limitation, computed from the immediately preceding acknowledgment.

11. No doubt, the proposition laid down by the trial court, if the same is regarded to be a proposition of law, could not be seriously disputed by learned counsel for the appellant. However, what is material is that this principle has not been correctly applied by the trial court, to the facts which exist and are proved on the record of the case.

12. The trial court was conscious of the fact that the date of acknowledgments as stated in the plaint, were not very exact, and were probably typographical errors; the trial court, therefore, rightly referred to the original documents for the purpose of ascertaining the true and correct dates of the relevant acknowledgments.

12.1 After referring to the original documents as proved evidence on record, the trial court found in favour of the plaintiff as regards the first balance confirmation statement (Exh.45) dated 30th January 1970, confirming the balance as it stood on 30th September 1969. The second such statement (Exh.46), although undated, is in fact confirmation of the debit balance by

the first defendant as it stood on 30th June 1970. Obviously, therefore, this statement must have been signed or confirmed after 30th June 1970. The third confirmation statement at Exh.47 is dated 16th July 1971 and confirms the balance as on 30th June 1971. On the basis of these three documents, the trial court found in favour of the plaintiff and consequently held that each such confirmation statement signed by the first defendant, was within a period of three years from the immediately preceding confirmation, and therefore served to extend the period of limitation.

12.2 The next such balance confirmation statement as discussed by the trial court is Exh.49 and is dated 6th August 1974, confirming the balance as it stood on 30th June 1974. The trial court found that the relevant date for the purpose of application of section 18, is the date on which the balance has been confirmed and this would be 6th August 1974. It is in this context that the trial court found that this statement dated 6th August 1974 is more than three years subsequent to the date of the earlier confirmation viz. 16th July 1971. Thus, the so-called 4th confirmation statement would not extend the period of limitation, in the sense that the period of limitation would not then be three years starting from 6th August 1974. it is on this aspect that the trial court has held against the plaintiff.

13. However, the trial court was aware and was conscious that there was one more balance confirmation statement, which was on record, which had been proved according to the rules of evidence, and had in fact been exhibited at exh.48. The trial court has also examined the document as if it was a piece of evidence and has found that under this balance confirmation statement, the first defendant has confirmed the debit balance in his account as it stood on 31st December 1972. Surprisingly, however, the trial court although it has appreciated the document as if the same is a proved document and therefore material evidence on record (and in my opinion rightly so), it has refused to take the same into consideration and to rely upon it as a piece of evidence simply because this particular balance confirmation statement (Exh.48) has not been specifically referred to, with reference to its date in para 5 of the plaint.

14. The trial court apparently tried to justify (in disregarding Exh.48) by invoking the provisions of Order 7 Rule 6 CPC, against the plaintiff. According to the trial Court, Order 7 Rule 6 CPC requires, and casts upon the plaintiff "a duty to show in the plaint the ground on

which he claims exemption from the law of limitation, it must be taken that each and every ground should be shown in the plaint and the ground for each separate exemption from the law of limitation should also be shown in the plaint". Thus, according to the trial court, if the plaintiff wanted to claim exemption from the law of Limitation on the basis of Exh.48, it was mandatory for the plaintiff to mention the relevant date of Exh.48 in para 5 of the plaint. The failure to mention this document with reference to its date, in para 5 of the plaint, according to the trial court, was fatal to the suit, inasmuch as "it must be said that the plaintiff did not claim or consider that ground as a ground for exemption from limitation in the plaint, and that ground for exemption cannot be taken into account".

15. In my opinion the trial court was clearly in error and has obviously misconstrued the provisions of Order 7 Rule 6 CPC, and has also misapplied the same to the facts established on record.

16. In my opinion, the trial court, while interpreting and applying the relevant provisions viz. Order 7 Rule 6, clearly lost sight of the two material facts. Firstly, what Rule 6 contemplates is that "the plaintiff shall show the ground upon which exemption from such law is claimed". What the trial court failed to appreciate in this context is that the plaint is required to set out only the ground or grounds for claiming such exemption i.e. the causes or reasons or attributes and/or the basis on which according to the plaintiff, the period of limitation is not to be strictly construed or to be strictly applied to the facts as stated in the plaint. What the trial court failed to appreciate is that the necessary recitals pertain to the grounds i.e. the causes and reasons, and such necessary recitals do not pertain to the specific or precise facts, events or documents. In this context, therefore, the trial court failed to appreciate that the necessary recitals need pertain only to the claim for exemption, and not to the specific evidence on which such a claim is ultimately to be established or justified by the plaintiff. In my opinion, therefore, the trial court was in error, and misled itself into equating (i) the need to set out the claim for exemption, with (ii) a specific recital of the specific evidence upon which such a claim may ultimately be established.

16.1 Moreover, the trial court also misconstrued Rule 6 and misled itself by ignoring the Proviso to the said Rule. A plain reading of the said Proviso makes it clear

that even in the absence in the plaint of a recital of any ground to claim exemption from the law of Limitation, the court may nevertheless permit the plaintiff to claim such an exemption, if such ground is not inconsistent with the grounds set out in the plaint. In other words, the mere absence of the necessary recital would not be fatal to the suit, and it is within the discretion of the court, to permit the plaintiff to claim such an exemption, subject only to the condition that such claim should not be inconsistent with the other grounds set out in the plaint.

16.2 The third aspect which is relevant to the present discussion pertains to pleadings in general and the same is found in Order 6 Rule 2 CPC. A plain reading of the said provision makes it clear that the pleadings in general (and this would certainly include the averments made in the plaint and/or averments required to be made in the plaint) shall contain and contain only a statement in a concise form of the material fact on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved. Thus, when the requirements of Order 7 Rule 6 are read in the context of Order 6 Rule 2, it becomes all the more obvious that the plaintiff is required only to plead the principle on which he claims exemption from the period prescribed by the Law of Limitation, but is not required to plead those specific facts, nor the factual evidence on the basis of which the plaintiff would ultimately seek to establish and/or justify his claim for exemption.

16.3 In my view, therefore, when it is found from the admitted facts of the case, that the plaintiff bank had specifically referred to in the plaint those specific balance confirmation letters, with a view to set out the principle that each of them amounted to an "acknowledgment" and would therefore extend the period of limitation, in succession, from the date of the last of such acknowledgments, a mere omission to mention or refer to one of such acknowledgments by date, could not possibly be fatal to the suit.

17. The trial court has taken support (for its own view) from a decision of the Privy Council, reported in AIR 1930, Privy Council, page 57. This decision has been interpreted by the trial court to establish a principle to the effect that "in the pleading, the party has to put forward all the material facts, and no evidence can be looked into upon is never put forward in the pleadings of the parties (SIC)". In my opinion, the trial court has

clearly misread and misinterpreted the aforesaid decision of the Privy Council. This would be apparent even from a plain reading of Order 7 Rule 6 and Order 6 Rule 2 of the CPC discussed hereinabove. As I have already indicated hereinabove, what is required to be pleaded are grounds, and/or reasons and/or the principles upon which the plaintiff claims exemption from the prescribed period of limitation, in view of or in the context of section 18 of the Limitation Act. Clearly, no party can be held to be mandatorily obliged to plead specific evidence in support of a general proposition of the nature contemplated by Order 7 Rule 6. Even otherwise, the trial court has clearly misconstrued the decision of the Privy Council, in view of the interpretation of the Supreme Court itself in respect of the very same decision of the Privy Council. The Supreme Court in the case of NAGUBAI VS. B. SHAMA RAO, reported in AIR 1956 SC page 593 has interpreted the aforesaid Privy Council decision, and in paragraphs 11 and 12 of the said decision, taken a view which only sets at naught the view expressed by the trial court.

17.1 A similar view has been expressed by the Supreme Court in its decision in the case of S.F. MAZDA VS. DURGA PRASAD (AIR 1961 SC 1236) in para 6 thereof.

18. The trial court in para 17 of the impugned judgement has further extended its erroneous view in favour of the second defendant as well. In other words, it was found that since the debit balances have been confirmed only by the first defendant and not by the second defendant, the "acknowledgments" which would extend the limitation would operate only in favour of the first defendant, but not in favour of the second defendant. This, in my opinion, is also an incorrect view not justified in law. It is obvious that the period of limitation prescribed by the Limitation act is to be computed with reference to the facts and circumstances as may be referred to in the relevant provision of law, and the period of limitation would be the same in respect of a principal debtor and the guarantor and/or surety, unless the specific provision carves out an exception. In the instant case it is nobody's case that the period of limitation would be different for the guarantor than the period prescribed for the suit against the principal debtor. Nevertheless the trial court has found, on an erroneous interpretation of the relevant provision, that even if the "acknowledgment" in question brings the suit within limitation, as against the principal debtor, the suit against the guarantor would nevertheless be time-barred.

19. I need not elaborate all these in greater details.

20. While dealing with the independent contentions raised by the second defendant-guarantor, in the context of issue no.9, the trial court has found that on account of the negligence of the plaintiff bank and the lengthy inaction on its part, the security in the form of hypothecated goods has been lost or diminished, and therefore, the same would discharge the second defendant from his obligations and liabilities as a surety. There is no serious controversy on the facts upon which such a submission is based. The second defendant has deposed that when he signed the guarantee deed, the goods hypothecated with the bank were worth Rs.25,000/- to 30,000/-, and this statement made by the second defendant, is not challenged. Furthermore, the second defendant has further asserted in his deposition that on the date of the suit and also on the date of his deposition, the goods which were the subject matter of hypothecation agreement were no longer in existence, apparently because the first defendant has, on account of the negligence or inaction of the plaintiff bank, managed to dispose of the same. Even this assertion of the second defendant has not been successfully challenged in his cross-examination by the plaintiff bank. From these facts it becomes obvious that the second defendant has lost his remedy against the first defendant, to proceed against the security of the hypothecated goods. The allegation of the second defendant that this result has been brought about on account of the negligence and inaction on the part of the plaintiff bank, must be held to have been established from the material on record. Under the circumstances that part of the decree passed by the trial court, dismissing the suit as against the second defendant, at least on this ground, is required to be upheld.

21. In the premises aforesaid, the judgement and decree of the trial court dismissing the plaintiff's suit on the ground of limitation is clearly erroneous and is required to be quashed and set aside qua the defendant no.1. Since I have held hereinabove that the suit is within limitation, a decree in favour of the plaintiff as prayed for must follow (as against defendant no.1) inasmuch as on the other facts and evidence on record the trial court has found in favour of the plaintiff. As discussed in the previous para, the dismissal of the suit against the second defendant must be confirmed.

22. Consequently, this appeal is allowed as against the first defendant and the plaintiff's suit as prayed for is decreed against the first defendant. However, the dismissal of the suit as against the second defendant is upheld and to that extent the present appeal fails. No order as to costs.

23. Decree accordingly.

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